

Message

From: Aranda, Amber [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2557889D5F134A3DBC525A2DBF6BFDF2-AARANDA]
Sent: 6/3/2021 1:01:00 PM
To: Koch, Erin [Koch.Erin@epa.gov]
Subject: RE: hardeman v monsanto decision
Attachments: Hardeman Summary - final.docx

Here's a final draft

Amber L. Aranda
Environmental Protection Agency
Office of General Counsel
202) 564-1737

From: Koch, Erin <Koch.Erin@epa.gov>
Sent: Thursday, June 3, 2021 7:30 AM
To: Aranda, Amber <aranda.amber@epa.gov>
Subject: RE: hardeman v monsanto decision

Sounds good. Thanks.

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Thursday, June 03, 2021 7:01 AM
To: Koch, Erin <Koch.Erin@epa.gov>
Subject: RE: hardeman v monsanto decision

Thanks Erin. Hadn't had a chance to read this without my computer flipping out on me until this morning.

Ex. 5 Attorney Client (AC)

Amber L. Aranda
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From: Koch, Erin <Koch.Erin@epa.gov>
Sent: Wednesday, June 2, 2021 6:04 PM
To: Aranda, Amber <aranda.amber@epa.gov>
Subject: RE: hardeman v monsanto decision

Ex. 5 Attorney Client (AC)

Erin

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Wednesday, June 02, 2021 4:41 PM
To: Koch, Erin <Koch.Erin@epa.gov>
Subject: RE: hardeman v monsanto decision

Hey Erin – Am sure with the holiday and other burdens you might not have seen this email. Attached is a draft per the email below. I need to reread through this, but am having computer probs and need to reboot shortly, so saving that reread for tomorrow. Let me know how you want to follow up and if you have additional thoughts or edits. Hope all is well -

Amber L. Aranda
Environmental Protection Agency
Office of General Counsel
202) 564-1737

From: Aranda, Amber
Sent: Wednesday, May 26, 2021 12:28 PM
To: Koch, Erin <Koch.Erin@epa.gov>
Subject: FW: hardeman v monsanto decision

Ex. 5 Attorney Client (AC)

Amber L. Aranda
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From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Wednesday, May 26, 2021 12:05 PM
To: Aranda, Amber <aranda.amber@epa.gov>
Cc: Koch, Erin <Koch.Erin@epa.gov>
Subject: RE: hardeman v monsanto decision

Sorry – I completely blanked on that. I had a law clerk put together the attached summary, and I put together a shorter version of the summary below:

Hardeman v. Monsanto Co. (9th Cir. Nos. 19-16636, 19-16708) On **May 14, 2021**, the Ninth Circuit (Hawkins, N.R. Smith (dissenting), R. Nelson) issued a published opinion holding that no part of the plaintiff's suit for damages based on exposure to Roundup was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA prohibits states from imposing requirements for labeling that differ from EPA's requirements under the Act. Hardeman brought "failure-to-warn" claims attacking the product labeling of Roundup, produced by defendant Monsanto. Hardeman is one of thousands of plaintiffs who have sued Monsanto in recent years in state and federal court, alleging that Roundup caused their non-Hodgkin's lymphoma. The district court denied Monsanto's motion to dismiss Hardeman's claims, finding the claims not preempted. Monsanto appealed. We filed an amicus brief in the Ninth Circuit arguing that, to the extent California law required Monsanto to include additional language on the Roundup label that was "in addition to or different from" the EPA approved label, that requirement was preempted by FIFRA. The Ninth Circuit rejected that argument, reasoning that FIFRA's misbranding provisions were consistent with California requirements and that Monsanto could simultaneously comply with both California and federal requirements by seeking to amend its label. The Court also addressed two issues not briefed by the United States. It upheld the district court's award of \$20 million in punitive damages, holding that Monsanto acted with malice by ignoring Roundup's carcinogenic risks and that the award was not "grossly excessive." Additionally, the Ninth Circuit

affirmed the district court application of the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for admitting Hardeman's expert testimony on the causal relationship between the active ingredient in Roundup and cancer. Judge N.R. Smith dissented as to punitive damages only. He would have held that Monsanto's low degree of reprehensibility on these particular facts could not constitutionally justify the district court's substantial punitive damages award.

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Wednesday, May 26, 2021 11:59 AM
To: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Matt – You mentioned sending a summary of the Hardeman case. Wondering if you have that available?

Amber L. Aranda
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From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Tuesday, May 18, 2021 12:56 PM
To: Aranda, Amber <aranda.amber@epa.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Great – I'll send out an invitation.

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Tuesday, May 18, 2021 12:55 PM
To: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Matt – TH at 2:00 works for Erin

Amber L. Aranda
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From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Tuesday, May 18, 2021 12:51 PM
To: Aranda, Amber <aranda.amber@epa.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Sounds good – I'm available this afternoon, anytime tomorrow morning before noon, or Thursday afternoon. Let me know if there is a time that works for you and Erin.

Jennifer – let me know if you would like to join as well.

-Matt

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Tuesday, May 18, 2021 11:15 AM
To: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Thanks Matt. **Ex. 5 Attorney Client (AC)** I think we should have a call to discuss, as I am assuming we will need to brief our management on the consequences of the decision and get new leadership views on this one.

Amber L. Aranda
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From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Tuesday, May 18, 2021 11:10 AM
To: Aranda, Amber <aranda.amber@epa.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Thanks Amber –

Ex. 5 Attorney Client (AC)

Best,

-Matt

Law360 (March 19, 2021, 8:46 PM EDT) -- Bayer AG on Friday announced that it would not be asking the U.S. Supreme Court to review a \$20.6 million verdict awarded to a former school groundskeeper who alleged that Monsanto's weedkiller Roundup caused his cancer.

Bayer said that the decision not to file a petition for certiorari with the high court was made after "careful and extensive consideration." The decision ends the case of Dewayne Johnson, and while Bayer said that it still believes that the state jury's verdict was not supported by the law or evidence, another Roundup verdict is better suited to be reviewed by the Supreme Court.

That case is Edwin Hardeman's \$25 million verdict, which is currently pending before the Ninth Circuit, Bayer said.

"Several factors contribute to making the Johnson case a less desirable candidate for Supreme Court review, including that the underlying opinion was issued by an intermediate level state court and the

portion dealing with the key issue of federal preemption is unpublished, and thus will have no bearing on any case besides Johnson," Bayer said.

Hardeman's case, on the other hand, is better suited for the high court's review because the appellate court is expected to release a decision that addresses the most significant federal issues in the litigation, which include preemption and the admissibility of expert evidence, Bayer said.

Johnson's case was the first to go to trial in August 2018, which resulted in an initial \$289 million verdict that was later reduced to \$20.6 million. Since then, more than 100,000 people across the country have filed claims against the company, which Bayer acquired in June 2018 for \$63 billion.

In October, the California Supreme Court refused to take a look at the verdict.

"Bayer and Monsanto saw the writing on the wall — the Johnson verdict was grounded in science and careful application of California law, and the Supreme Court was never going to upset the verdict," R. Brent Wisner of Baum Hedlund Aristei & Goldman PC told Law360. "We are very pleased that Mr. Johnson was able to see justice done before he passed. He is a bona fide American hero."

The Ninth Circuit is currently reviewing the Hardeman case. During a teleconference hearing in October, U.S. Circuit Judge N. Randy Smith seemed skeptical of Monsanto's arguments that the verdict must be overturned because of the U.S. Environmental Protection Agency's approval of the herbicide.

Monsanto's counsel Seth P. Waxman of WilmerHale argued that the jury trial over Hardeman's failure-to-warn claims should never have been held, because his claims are preempted by the EPA's consistent findings that exposure to Roundup's active ingredient, glyphosate, does not cause cancer in humans and no cancer warning is appropriate.

Waxman noted that the EPA has approved 45 versions of the Roundup labels and conducted reviews of the herbicide over decades that have been "nothing short of encyclopedic."

But Judge Smith questioned whether the EPA's approval matters in light of a provision in the Federal Insecticide Fungicide and Rodenticide Act that says "in no event shall registration of an article be construed as a defense" against a FIFRA violation.

The judge added that FIFRA says an herbicide's registration should serve as "prima facie evidence" that its labeling and packaging comply with the act's registration provisions, "but that's it."

Johnson is represented by R. Brent Wisner and Pedram Esfandiary of Baum Hedlund Aristei & Goldman PC, Michael J. Miller, Curtis G. Hoke and Jeffrey A. Travers of the Miller Firm LLC, and Mark E. Burton of Audet & Partners LLP.

Monsanto is represented by David M. Axelrad, Jason R. Litt and Dean A. Bochner of Horvitz & Levy LLP, and K. Lee Marshall of Bryan Cave Leighton Paisner LLP in the Johnson case. The company is represented by Seth P. Waxman of WilmerHale in the Hardeman case.

Hardeman is represented by David Wool of Andrus Wagstaff PC.

The cases are Dewayne Johnson v. Monsanto Co., case number S264158, in the Supreme Court of California and Hardeman v. Monsanto Co., case numbers 19-16253, 19-16255, 19-16636 and 19-16708, in the U.S. Court of Appeals for the Ninth Circuit.

From: Aranda, Amber <aranda.amber@epa.gov>

Sent: Monday, May 17, 2021 4:42 PM

To: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

My thoughts below

Amber L. Aranda
Environmental Protection Agency
Office of General Counsel
202) 564-1737

From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Monday, May 17, 2021 3:51 PM
To: Aranda, Amber <aranda.amber@epa.gov>
Cc: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Thanks Amber –

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC)

-Matt

From: Aranda, Amber <aranda.amber@epa.gov>
Sent: Monday, May 17, 2021 3:15 PM
To: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Subject: RE: hardeman v monsanto decision

Ex. 5 Attorney Client (AC)

Amber L. Aranda
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From: Oakes, Matthew (ENRD) <Matthew.Oakes@usdoj.gov>
Sent: Friday, May 14, 2021 12:28 PM
To: Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>; justin.smith@usdoj.gov; Koch, Erin <Koch.Erin@epa.gov>; Perlis, Robert <Perlis.Robert@epa.gov>; Aranda, Amber <aranda.amber@epa.gov>
Subject: hardeman v monsanto decision

The 9th Circuit opinion in the Hardeman v. Monsanto case just came out. This is the case where we filed an amicus brief arguing that any California state-based labeling requirements were preempted by FIFRA. The 9th Cir. affirmed the judgment of the district court and found that California law was consistent with FIFRA. I haven't read the decision yet (it's long). I'll follow up if there is more to report.

Matt Oakes
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United States Department of Justice
Environment and Natural Resources Division
Law and Policy Section
(202) 532-3129 (cell)